IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

WIND POINT PARTNERS VII-A, L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N19C-08-260 EMD CCLD
	)	
INSIGHT EQUITY A.P. X COMPANY, LLC; INSIGHT EQUITY VISION PARTNERS, LP; INSIGHT EQUITY MANAGEMENT COMPANY, LLC; ROSEWOOD VISION CORPORATION; and ROSEWOOD PRIVATE INVESTMENTS, INC.,	)	
	)	
Defendants.	)	

Submitted: May 10, 2020
Decided: August 17, 2020

Upon Defendants' Motion to Dismiss,
GRANTED, in part, and DENIED, in part

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DAVIS, J.

I. INTRODUCTION

This action is assigned to the Complex Commercial Litigation Division. The case arises out of a sale and purchase of a company, Vision Ease, LP (d/b/a Vision-Ease Lens) ("Vision Ease"), through a securities purchase agreement (the "SPA"). On September 17, 2014, Plaintiff Wind Point Partners VII-A, L.P. ("Wind Point") purchased Vision Ease from Defendants Insight Equity A.P. X Company, LLC ("Insight LLC"), Insight Equity Vision Partners, LP ("Insight LP"), Insight Equity Management Company, LLC ("Insight Equity Management"), Rosewood Vision Corporation ("Rosewood Vision"), and Rosewood Private Investments, Inc. ("Rosewood Private Investments") (collectively "Defendants").

Wind Point alleges Defendants intentionally misled and induced Wind Point to purchase Vision Ease through Defendants' preparation and presentation of Vision Ease's financial statements. Wind Point now brings an action against Defendants. Through a complaint filed on or about August 27, 2019 (the "Complaint"), Wind Point asserts claims for: Fraud (Count I); Violation of the Texas Securities Act ("TSA") (Count II); and Breach of the SPA/Indemnification (Count III).

On November 14, 2019, Defendants filed Defendants' Motion to Dismiss ("the Motion"). In response, Wind Point filed its Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss (the "Response") on February 6, 2020. Defendants completed the briefing with its Reply Brief in Support of Defendants' Motion to Dismiss (the "Reply") on March 3, 2020. The Court held a hearing on the Motion, the Response and the Reply on May 10, 2020. The Court then took the Motion under advisement. For the reasons set forth below, the Court **DENIES IN PART AND GRANTS IN PART** the Motion.

II. BACKGROUND[1]

a. THE SPA

Through the SPA, Defendants sold their interests in Vision Ease to Vision Ease LP, LLC ("Vision Ease LP") and Vision Ease GP, LLC, ("Vision Ease GP"), two Delaware limited liability companies affiliated with Plaintiff Wind Point, for $180 million.[2] Vision Ease is a global manufacturer of branded corrective ophthalmic lenses headquartered in Ramsey, Minnesota, with manufacturing facilities in Ramsey, Jakarta, Indonesia and Bangkok, Thailand.[3] Vision Ease sells its corrective lenses through independent and retail eye care locations throughout the world.[4]

SPA Section 9.16 contains a forum-selection clause providing that "any claim or cause of action arising out of or relating to" the SPA be brought in a federal court in Delaware.[5] The SPA also specifies that the agreement shall be "governed and controlled as to validity, enforcement, interpretation, construction, effect and in all other respects by the internal Laws of the State of Delaware applicable to Contracts made in that state" without regard to choice of law principles.[6]

The SPA has a severability clause designed to preserve the parties' intended agreement. It provides that if any provision of the SPA is "held to be invalid, illegal or unenforceable … in any jurisdiction … such provision or portion thereof shall be struck from the remainder of [the

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[1] Unless otherwise indicated, the following are the facts as alleged in the Complaint. For purposes of the Motion, the Court must view all well-pleaded facts alleged in the Complaint as true and in a light most favorable to the Plaintiff. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).
[2] *See* Compl. at 1.
[3] *Id*. at 14.
[4] *Id*.
[5] Ex. 1 ("SPA") § 9.16.
[6] *Id*. § 9.11.

SPA]" such that the SPA shall be "reformed, construed and enforced … so as to best give effect to the intent of the Parties[.]"[7]

Additionally, the SPA sets out representations and warranties on which each party to the SPA relied, including those made by the Partnership and the Sellers (Article III), the Sellers alone (Article IV), and the Purchaser (Article V). Vision Ease GP and Vision Ease LP are defined as the "Purchaser."[8] Insight Equity A.P. X, LP (d/b/a Vision-Ease Lens) is defined as the "Partnership."[9] Insight LP and Rosewood Vision are defined as the "Sellers."[10] SPA Section 9.1 specifies the Purchaser acknowledged and agreed that Sellers had not made "any representation or warranties relating to itself or its businesses or otherwise in connection with the transactions contemplated in [the SPA]" as well as disclaimed reliance on any extra-contractual representations and warranties made by any "[a]ffiliate, officer, employee or agent" of any Seller.[11]

SPA Section 9.6 provides:

> This Agreement, the Ancillary Documents, the NDA, and the other instruments to be delivered by the Parties pursuant to the provisions hereof constitute the entire agreement between the Parties and shall be binding upon and inure to the benefit of the Parties hereto and their respective legal representatives, successors and permitted assigns. Each exhibit and schedule to this Agreement shall be considered incorporated into this Agreement.[12]

The SPA contains a "Survival Clause." SPA Section 7.1 expressly provides that certain representations and warranties, including those contained in Section 3.6, survive until "the close of business on the eighteen (18) month anniversary of the Closing Date," and that any "claim for

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[7] *Id*. § 9.10.
[8] *Id*. at 1.
[9] *Id*.
[10] *Id*.
[11] *Id*. § 9.1.
[12] *Id*. § 9.6.

indemnity … must be brought in accordance with this ARTICLE VII prior to expiration of the applicable survival period set forth in this Section 7.1."[13]

SPA Section 7.8 imposes a separate notice requirement distinct from the Survival Clause in SPA Section 7.1.[14] Under this section, an "Indemnified Party" seeking indemnification under Article VII of the SPA must "notify the Indemnifying Party promptly in writing" specifying the basis for liability under the SPA and describing the damages sought with reasonable particularity.[15] Moreover, the SPA provides that the Article VII indemnification provisions constitute the "sole and exclusive remedy" for "any matters arising under or relating to" the SPA and the transactions contemplated therein, except for a claim based on the "fraud of any Party" to the SPA.[16]

On March 17, 2016—the day any indemnification claims pursuant to the SPA expired—Vision Ease LP and Vision Ease GP sent Insight LP and Rosewood Vision a letter titled "Notice of an Indemnification Claim" (the "Claim Notice"). Through the Claim Notice, Vision Ease LP and Vision Ease GP alleged breaches of Section 3.6 and demanded $18,023,709.[17] Vision Ease LP and Vision Ease GP specifically relied on "Article VII of the [SPA]," noting that they were sending the Claim Notice on behalf of Purchasers "and for all Purchaser Indemnitees" pursuant to this provision. Neither Vision Ease LP, Vision Ease GP, nor any other party or non-party filed any claims during the 18-month Survival Period.

[13] *Id*. § 7.1.
[14] *Id*. § 7.8.
[15] *Id*.
[16] *Id*. at § 7.10.
[17] *See* Ex. 2, Mar. 17, 2016 Letter, at 5; *see also* Compl. ¶ 230.

b. THE ASSIGNMENT OF LITIGATION

In early August 2017, Vision Ease and Performance Optics LLC ("Performance Optics") were sold to Hoya Corporation.[18] In connection with the sale, Performance Optics and Wind Point entered into an assignment of litigation (the "Assignment of Litigation"). The Assignment of Litigation provides that Performance Optics, on behalf of itself and its subsidiaries, assigned their claims and rights against Rosewood Vision and Insight LP pursuant to the SPA to Wind Point.[19] The Assignment of Litigation defines Rosewood Vision and Insight LP as "Sellers" and asserts that "both the Assignors and the Assignee" have certain "Claims" against "Sellers" by virtue of their status as "indemnified parties" under the SPA.[20] In the Assignment of Litigation, Performance Optics and Wind Point also agreed that they "anticipate filing a lawsuit against" Rosewood Vision and Insight LP "in State Court in Delaware, Texas or another appropriate forum."[21]

Defendants contend that the Assignment of Litigation did not assign all of Performance Optics' claims. According to Defendants, the Assignment of Litigation did not purport to assign the following claims: (1) claims against Insight Equity LLC, the remaining "Seller" as that term is defined in the SPA; (2) claims against Insight Equity Management or Rosewood Private Investments, who are not parties to the SPA;[22] and (3) any fraud or statutory claims.

[18] *See* Compl. ¶¶ 6, 14, n.2.
[19] Ex. 3 ("Assignment of Litigation"); Compl. ¶ 6.
[20] *Id*. at 1.
[21] *Id*.
[22] *Id*.

c. Defendants' Involvement in the Management of Vision Ease and its Sale to Wind Point

Through the SPA, Wind Point purchased Vision Ease from the Defendants on September 17, 2014.[23] As alleged in the Complaint, Rosewood Vision is either a wholly-owned subsidiary or vehicle of Rosewood Private Investments, and Insight LLC and Insight LP are vehicles formed by Insight Equity Management.[24]

For ten years prior to September 2014, Insight LP and Rosewood Vision had controlled and dominated Vision Ease's Board of Directors.[25] As such, the principals of Insight LP and Rosewood Vision were heavily involved in Vison Ease's day-to-day operations and the sale to Wind Point.[26] For instance, Insight LP's CEO and Managing Director, Ted Beneski was also the Chairman of Vision Ease's Board and led the negotiations with Wind Point.[27] Mr. Beneski and the other Board members knew that the $180 million purchase price was predicated on Vision Ease achieving a range of $23 million to $25 million in adjusted EBITDA by the end of 2014.[28] Mr. Beneski provided this information to Vision Ease's CFO Rich Faber, who, along with the company's Controller Oliver Nottley, allegedly acted as Defendants' agents to implement the accounting fraud which falsely inflated Vision Ease's EBITDA in order to make Wind Point believe that it was paying the correct amount for the company.[29] Mr. Beneski and the other Board members understood that Wind Point would be preparing a quality of earnings analysis ("QOE") for Vision Ease and that the QOE "had to be prepared and presented in accordance with

[23] Compl. ¶ 1.
[24] *Id*. ¶¶ 7–12.
[25] *Id*. ¶¶ 10, 11, 46, 49, 52, 58.
[26] *Id*.
[27] *Id*. ¶¶ 61–63; Email from T. Beneski to V. Vescovo et al., dated Apr. 17, 2014; Non-Disclosure Agreement, dated Feb. 7, 2014; Letter of Intent, dated May 19, 2014 (Exs. B–D to Burns Aff.).
[28] Compl. ¶ 62; Email from T. Beneski to V. Vescovo et al., dated Apr. 25, 2014 ("Beneski Email") (Ex. A to Burns Aff.).
[29] Compl. ¶ 24; Beneski Email at 1.

GAAP … and had to accurately and fairly present the financial condition of Vision Ease in all material respects."[30]

Wind Point drafted the QOE based on financial information provided by Defendants that omitted material information concerning Vision Ease's manufacturing variances, O&E inventory reserves, and reserves for MyCoat Machines.[31] According to Wind Point, when Wind Point asked Vision Ease to verify the QOE, Mr. Faber, acting on behalf of Defendants, falsely confirmed it was accurate and reliable.[32] Insight LP and Rosewood Vision controlled Vision Ease's operations and strategy and were involved in the implementation of that strategy.[33] Mr. Beneski, along with Victor Vescovo of Insight LP, G.T. Barden of Rosewood Vision, and the other Insight LP and Rosewood Vision principals on the Board, purportedly played key roles in the company's operations and corporate strategy.[34]

As Board members, the Insight LP and Rosewood Vision principals received regular updates with detailed financial information concerning Vision Ease's income, operations, and projected sales, including information concerning manufacturing variances, O&E reserves, and the company's MyCoat line of business.[35] The Insight LP and Rosewood Vision principals also met at least once per quarter to discuss Vision Ease's monthly, quarterly and/or annual financial results, future outlook and forecasts, growth initiatives, and budgets.[36] In light of the detailed accounting and financial information regularly provided to the Board, Mr. Beneski and the other Board members allegedly knew that Vision Ease could manipulate its EBITDA by applying certain accounting treatment to manufacturing variances generated by the production of eyeglass

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[30] Compl. ¶¶ 67, 69.
[31] *Id.* ¶¶ 88, 183.
[32] *Id.* ¶¶ 183–187.
[33] *Id.* ¶¶ 10, 51.
[34] *Id.* ¶¶ 50–51, 58.
[35] *Id.* ¶¶ 52, 131, 149.
[36] *Id.* ¶ 52.

lenses.[37] On at least one occasion prior to the acquisition, Insight LP had explicitly instructed Messrs. Faber and Nottley to "take a greater manufacturing variance" in order to "hit[] budget from an EBITDA perspective," despite knowing that such accounting treatment would artificially inflate inventory and thus misrepresent the company's financials.[38]

During the due diligence period, Wind Point and Grant Thornton requested and received financial information from Vision Ease and Defendants, including the unaudited balance sheet and statements of income and cash flows of Vision Ease leading up to the SPA (the "Interim Financial Statements").[39] According to Wind Point, Mr. Beneski and the other Insight LP and Rosewood Vision principals on Vision Ease's Board, knew or should have known that the financial information presented to Wind Point during due diligence omitted material information concerning manufacturing variances, O&E reserves, and the MyCoat business such that the QOE was inaccurate and the representations in Sections 3.6, 3.8, and 3.9 of the SPA were false.[40] Insight LP itself verified "the final EBITDA for August 2014 and had consented to the higher and misstated number and the ahistorical and non-GAAP compliance accounting that led to the misstated Interim Financial Statements."[41]

d. THE POST-CLOSING DISCOVERIES

In or around September 2015, Wind Point discovered that Defendants had provided incomplete and false information about Vision Ease's finances.[42] Wind Point discovered this when Vision Ease's new CFO, Kevin McMenimen, and the finance team were having difficulty bridging 2014 year-end through to 2015 expectations.[43] When Mr. McMenimen asked Mr.

[37] *Id*. ¶¶ 92–93.
[38] *Id*. ¶¶ 92–93.
[39] *Id*. ¶ 74.
[40] *Id*. ¶¶ 113, 131, 146, 149, 185, 189.
[41] *Id*.¶ 227.
[42] *Id*. ¶ 228.
[43] *Id*. ¶¶ 216–217.

Nottley why the year-over-year financials could not be reconciled, Mr. Nottley admitted that he and Mr. Faber had misrepresented the company's financials.[44] Mr. Nottley then provided a series of emails he had sent to Mr. Faber in December 2014 and January 2015, detailing how they had misrepresented Vision Ease's financials prior to closing and then hid the misrepresentations by making adjustments in the opening balance sheet.[45] In an email to Mr. Faber dated January 4, 2015, Mr. Nottley confirmed that "[p]rior to the sale of the company, significant manufacturing variances were taken to the income statement rather than being capitalized against the inventory value, resulting in inventory being overstated on the closing balance sheet by $2,569k. This was not compliant with US GAAP."[46]

Mr. Nottley further stated that "[Insight LP] agreed to the EBITDA number after a detailed review of the August YTD results presumably in full knowledge of the accounting that supported them."[47] Mr. Nottley also told Mr. McMenimen that Vision Ease's CEO Doug Hepper, who was on the Board, knew that the company's EBITDA had been overstated.[48] Wind Point commenced an investigation, which confirmed Mr. Nottley's statements and established that the EBITDA and working capital of Vision Ease were both overstated and the representations and warranties in the SPA were breached.[49] The investigation concluded that Vision Ease and Defendants had engaged in the following fraudulent, undisclosed manipulations beginning contemporaneously with the signing of the Letter of Intent: (1) changing the quality control acceptance standards for inventory produced in Jakarta; (2) failing to adjust for positive manufacturing variances pertaining to Jakarta manufactured inventory; (3) failing to reserve for

[44] *Id*. ¶ 218.
[45] *Id*. ¶¶ 223–227.
[46] *Id*. ¶ 227; Ex. E to Burns Aff., Email from O. Nottley to R. Faber, dated Jan. 4, 2015 ("Nottley Email").
[47] Nottley Email at 1; Compl. ¶ 227.
[48] Compl. ¶ 220.
[49] *Id*. ¶ 228.

O&E inventory as required by GAAP and Vision Ease's policy; and (4) failing to properly account for the true value of the MyCoat Machine business.[50]

The purported effect of these manipulations was to overstate Vision Ease's EBITDA and working capital by over $28.8 million.[51] Defendants allegedly hid these manipulations in the post-closing purchase accounting goodwill adjustments to prevent Wind Point from discovering them.[52] After completing its investigation, Wind Point demanded indemnification from Defendants under the SPA by way of a letter to Insight LP and Rosewood on March 16, 2016, within the SPA's 18-month survival period.[53]

e. THE TEXAS LITIGATION

Wind Point filed an action in Texas state court (the "Petition") on September 11, 2017 asserting the same causes of action as here.[54] Wind Point asserts that it filed the Petition in Texas state court because there was no jurisdiction over Wind Point's claims in Delaware federal court, nor was there jurisdiction in Delaware state court at that time.[55] Wind Point contends that none of Wind Point's claims involve a federal question and because two of Wind Point's limited partners destroyed federal diversity jurisdiction pursuant to the jurisdictional rules applicable to business trusts.[56] Wind Point also claims there was no personal jurisdiction over Insight LLC, Insight LP, and Insight Equity Management in Delaware state court because their principal places of business are in Texas.[57]

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[50] *Id*. ¶¶ 73, 89–91, 111–114, 131–138, 229.
[51] *Id*. ¶ 241.
[52] *Id*. ¶¶ 207–215.
[53] *Id*. ¶ 230.
[54] *Id*. ¶ 15.
[55] *Id*. ¶¶ 15-21.
[56] *Id*. ¶¶ 15-21.
[57] *Id*. ¶ 24.

Wind Point alleged in the Petition that SPA Section 9.16 "fails and the jurisdiction of the federal courts (in any jurisdiction) cannot be invoked as the parties to the action lack diversity of citizenship."[58] Defendants moved to dismiss on the ground that Wind Point's claims were subject to SPA Section 9.16, which required litigation to proceed in Delaware, not Texas.[59] Defendants argued that even if diversity jurisdiction was lacking and suit could not be brought in Delaware federal court, the SPA still required suit to be brought in Delaware state court because the SPA's severability clause applied to strike the word "federal" from the forum-selection clause.[60] In its opposition, Wind Point sought to establish lack of diversity jurisdiction by including affidavits that attempted to prove each parties' citizenship.[61] On December 20, 2017, the Texas trial court denied the motion to dismiss.[62] The court agreed with Wind Point that its claims were properly asserted in Texas as Delaware federal and state courts were unavailable.[63]

Defendants filed a petition for writ of mandamus in the Court of Appeals for the Fifth District at Dallas (the "Court of Appeals"), seeking vacatur of the order denying Defendants' motion to dismiss and dismissal of the lawsuit pursuant to the SPA Section 9.16.[64] Defendants continued to argue that Wind Point had not met its burden to show that diversity jurisdiction was lacking.[65]

On August 28, 2018, the Court of Appeals reversed the trial court on procedural grounds, finding that "'the unavailability of a federal court ha[d] not been conclusively established, and

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[58] Plaintiff's Original Pet. at ¶ 17; *see also* Compl. ¶¶ 17–21.
[59] *See* Compl. ¶ 22.
[60] *See id.* ¶¶ 22–23.
[61] *See id.* ¶ 24.
[62] *See id.* ¶ 26.
[63] *Id.* ¶¶ 22–23. Importantly, Insight LLC, Insight LP, and Insight Equity Management Company, LLC did not consent to personal jurisdiction in Delaware state court until they filed their Petition for Writ of Mandamus with the Court of Appeals on February 16, 2018. *See id.* ¶¶ 28, 30.
[64] *See id.* ¶ 27.
[65] *See id.*

the SPA provide[d] a remedy even if Delaware federal court would lack jurisdiction'" since the severability clause required the Court to strike the word "federal" from the SPA's forum selection clause.[66] The Court of Appeals agreed with Defendants' interpretation of SPA Section 9.16, and conditionally granted Defendants' mandamus petition.[67] The Court of Appeals directed the trial court to issue an order vacating its denial of Defendants' motion to dismiss and dismiss Wind Point's claims, which it did on September 5, 2018.[68] On September 17, 2018, the Court of Appeals withdrew its first opinion and later modified that order on October 1, 2018 to reflect that the dismissal was "without prejudice."[69] The Court of Appeals also specifically noted that Wind Point failed to prove that a federal court would lack subject-matter jurisdiction.[70] The Court of Appeals concluded that even if jurisdiction would not be proper in Delaware federal court, the severability clause in the SPA would strike the word "federal" from SPA Section 9.16 and require suit to be filed in Delaware state court.[71]

On September 5, 2018, the Texas trial court entered an order vacating its prior order denying Defendants' motion to dismiss and dismissed Wind Point's claims.[72] Within one year of the Court of Appeals' decision, Wind Point filed the Complaint in this Court.[73] The Complaint asserts causes of action for (i) Fraud (Count I); (ii) Violation of TSA (Count II); and (iii) Breach of the SPA/Indemnification (Count III). Defendants filed the Motion seeking relief under Superior Court Civil Rule 12(b)(6).

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[66] *Id*. ¶32(citing the August 28, 2018 Memorandum Opinion, at p. 7).
[67] *See In re Rosewood Private Invs., Inc.*, 2018 WL 4090688, at *6 (Tex. App.—Dallas Aug. 28, 2018, orig. proceeding) (mem. op.).
[68] *Id*.; *see also* Compl. ¶¶ 15, 33.
[69] *Id.*
[70] *Id*. at *4 (noting "the record does not conclusively demonstrate the absence of federal diversity jurisdiction").
[71] *Id*. at *5.
[72] *See* Compl. ¶ 33.
[73] *See id.* at 1.

III. PARTIES' CONTENTIONS

a. MOTION

In the Motion, Defendants argue that the Court should dismiss the Complaint because: (i) all of Wind Point's Claims are time-barred due to the Survival Clause and the inapplicability of the Delaware Savings Statute; (ii) all claims against Insight Equity Management and Rosewood Private Investments are barred by the SPA; (ii) Wind Point lacks standing for its fraud and TSA claims; and (iv) the SPA's choice of law provision bars Wind Point's TSA claim.

b. RESPONSE

In the Response, Wind Point argues: (i) the Complaint's claims are timely under Delaware's Savings Statute and the doctrine of equitable tolling; (ii) Wind Point has standing to assert its fraud claims where Defendants had a duty to Wind Point independent of the SPA; (iii) Wind Point has standing as a purchaser under the TSA, and the assignment conveyed rights to bring fraud and TSA claims; and (iv) Delaware law prohibits Defendants from using the SPA to shield themselves from liability for their own fraud.

IV. STANDARD OF REVIEW

Upon a motion to dismiss, the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[74] However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."[75]

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[74] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, No. 09C-09-136, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).
[75] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).

V. DISCUSSION

a. WIND POINT'S FRAUD AND TSA CLAIMS ARE TIMELY, BUT ITS BREACH OF CONTRACT CLAIM IS UNTIMELY.

Defendants contend that the claims for breach of contract, fraud, and TSA violations should be dismissed as untimely. In Delaware, the Court applies a three-step analysis to determine whether a claim is time-barred.[76] First, the Court determines when the cause of action accrues.[77] For breach of contract claims, "the wrongful act is the breach, and the cause of action accrues at the time of breach."[78] For tort claims, "the wrongful act is a tortious act causing injury, and the cause of action accrues at the time of injury."[79] Second, the Court determines whether the statute of limitations may be tolled so that the cause of action accrues after the time of breach or injury.[80] The plaintiff must plead with specificity why the statute of limitations should be tolled.[81] Third, if a tolling exception applies, the Court determines when the plaintiff received inquiry notice.[82] The statute of limitations begins to run from the date when the plaintiff received inquiry notice.[83]

i. The Indemnification Notice is Not Sufficient to Satisfy the Statute of Limitations.

As a preliminary matter, the fact that Wind Point's affiliates sent an indemnification notice on March 17, 2016 does not affect the statute of limitations analysis. The statute of limitations establishes a time limit for suing in a civil case.[84] The purpose of the statute of

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[76] *Wal–Mart Stores Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004).
[77] *Id.*
[78] *CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032 at *7 (Del. Ch. Jan. 24, 2005) (citing *Ambase Corp. v. City Investing Co.*, 2001 WL 167698, at *14 n. 4 (Del. Ch. Feb. 7, 2001)).
[79] *Id.*; *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 834 (Del. 1992).
[80] *Wal–Mart Stores*, 860 A.2d 312 (Del. 2004).
[81] *Young & McPherson Funeral Home, Inc. v. Butler's Home Improvement, LLC*, 2015 WL 4656486, at *1 (Del. Super. Aug. 6, 2015); *Eni Holdings, LLC v. KBR Grp. Hldgs, LLC*, 2013 WL 6186326, at *11 (Del. Ch. Nov. 27, 2013).
[82] *Wal–Mart Stores*, 860 A.2d 312.
[83] *Id.*
[84] *Ievoli v. Delaware State Hous. Auth.*, 2018 WL 5839937, at *2 (Del. Super. Nov. 7, 2018).

limitations is "to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh."[85]

In *Eni Holdings, LLC v. KBR Group Holdings, LLC*, the counterclaim plaintiff provided the counterclaim defendant with notice of some of its claims before the survival period expired, but did not file its claims in the Court of Chancery until over one year after the survival period had expired.[86] The counterclaim plaintiff argued that its notice was sufficient to preserve its claims, consistent with the agreement's dispute-resolution procedure, which required the counterclaim plaintiff to provide notice, not file suit.[87] The Court of Chancery dismissed its claims as untimely, explaining that the counterclaim plaintiff's argument that it could "preserve a lawsuit based on an expired representation or warranty merely by providing notice before the applicable Termination Date" was not reasonable.[88] The Court of Chancery reasoned that the agreement contemplated "parallel, not mutually-exclusive, dispute resolution procedures."[89] Thus, if either party, "after providing notice to the other [pursuant to the contractual dispute-resolution procedure], runs up against the contractual limitations period, it must bring suit or be thereafter barred."[90]

In *CertainTeed Corp. v. Celotex Corp.*, the plaintiff had entered into an asset purchase agreement with the defendants.[91] The plaintiff claimed that the defendants had breached the agreement's representations and sought indemnification for losses incurred as result of the

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[85] *Id*.
[86] *See Eni Hldgs*, 2013 WL 6186326, at *3.
[87] *Id*. at *9.
[88] *Id*. (citing *Escue v. Sequent, Inc*., 869 F. Supp. 2d 839, 849 (S.D. Ohio 2012) ("Just as a party cannot evade a statutory statute of limitations simply by providing notice, so too [a counterclaimant] cannot evade the contractual limitations period by providing notice in the absence of a contractual provision permitting him to do so.")).
[89] *Id*. at *10.
[90] *Id*.
[91] 2005 WL 217032 at *1.

breach under the agreement's indemnification clause.[92] In ruling on the defendants' motion to dismiss, the Court found that the contractual indemnification claims were valid only if notice of the claim was filed within the applicable survival period and the action was also filed within the "applicable statute of limitations" for each claim.[93]

This Court finds the reasoning in *Eni Holdings* and *CertainTeed* is also applicable to the facts of this case. Although the SPA's dispute resolution procedure requires providing notice of claims,[94] Wind Point was also required to file the action within the applicable statute of limitations to preserve its claims.

ii. The Survival Clause Allows for Tolling.

Defendants argue that under SPA Section 7.1, defined above as the Survival Clause, Wind Point, or its predecessor in interest, was required to file suit no later than March 17, 2016. Wind Point did not file by March 17, 2016. Instead, Wind Point first filed suit in Texas on September 11, 2017. Moreover, Wind Point did not file the instant lawsuit until August 27, 2019.

Delaware respects parties' contractual choices are respected and there is no special rule requiring that, in order to contractually shorten the statute of limitations, parties utilize "clear and explicit" language.[95] Delaware courts have interpreted contractual provisions that limit the survival of representations and warranties as evidencing an intent to shorten the period of time in which a claim for breach of those representations and warranties may be brought.[96]

Section 7.1 provides:

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[92] *Id*.
[93] *Id*. at *5.
[94] *See* Ex. 1, SPA § 7.8.
[95] *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *12 (Del. Ch. July 11, 2011).
[96] *See id*.; *Sterling Network Exchange, LLC v. Digital Phoenix Van Buren, LLC*, 2008 WL 2582920, at *1 (Del. Super. Mar.28, 2008); *Campanella v. General Motors Corp*., 1996 WL 769769, at *1 (Del. Super. Nov. 6, 1996).

> Except as otherwise specified herein, the representations and warranties of the Parties contained herein shall survive the Closing for a period expiring at the close of business on the eighteen (18) month anniversary of the Closing Date; provided, however, that the Fundamental Representations, shall survive the Closing indefinitely. Any claim for indemnity under this ARTICLE VII for breach of a representation or warranty of any of the Parties must be brought in accordance with this ARTICLE VII prior to expiration of the applicable survival period set forth in this Section 7.1.[97]

Defendants are correct that the statute of limitations period is shortened by the clear and explicit language in the Survival Clause. Under Delaware law, parties' contractual choices are respected and are not required to utilize clear and explicit language in order to contractually shorten the statute of limitations.[98] Delaware courts have interpreted contractual provisions that limit the survival of representations and warranties as evidencing an intent to shorten the time period in which a claim for breach of those representations and warranties may be brought.[99] The representations and warranties alleged to have been breached are not "Fundamental Representations." Accordingly, the representations and warranties only survive until the eighteen-month anniversary of the closing date.

However, the Survival Clause does not foreclose a tolling analysis. In *GRT, Inc. v. Marathon GTF Tech., Ltd.*, the Court of Chancery still conducted a tolling analysis despite similar contractual language.[100] The survival clause there stated:

> The representations and warranties of [GRT] contained in Section 3.16 shall survive until the expiration of the applicable statutes of limitations ..., and will thereafter terminate, together with any associated right of indemnification pursuant to Section 7.3. All other representations and warranties in Sections 3 and 4 will survive for twelve (12) months after the Closing Date, and will thereafter terminate,

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[97] SPA § 7.1.
[98] *GRT*, 2011 WL 2682898, at *12; *AssuredPartners of Virginia, LLC, v. William Patrick Sheehan*, 2020 WL 2789706, at *14 (Del. Super. May 29, 2020).
[99] *Id.*
[100] *GRT*, 2011 WL 2682898, at *12.

> together with any associated right of indemnification pursuant to Section 7.2 or 7.3 or the remedies provided pursuant to Section 7.4.[101]

The Court of Chancery found that the survival clause created a one-year statute of limitations and then analyzed whether tolling should apply.[102] The Court of Chancery dismissed the breach of representation claims as barred by the statute of limitations after determining that the plaintiff did not adequately plead application of a tolling exception.[103]

In *Kilcullen v. Spectro Sci., Inc.*, the Court of Chancery examined a survival clause that provided:

> all representations and warranties in this Agreement [other than certain representations and warranties not relevant here] ... shall terminate on the date that is twelve (12) months following the Closing Date.[104]

The Court of Chancery explicitly stated that tolling of the contractual limitations period of one year was allowed.[105]

The Court will follow the reasoning of *Kilcullen* and *GRT, Inc.* As such, the Court holds that the language of SPA Section 7.1 permits tolling. If the intent was to make the closing date the effective accrual date for bringing a claim, the contract could have made that explicit. The Texas trial court never addressed whether tolling should apply and instead dismissed the action on the grounds that Delaware state court was the appropriate forum.

Thus, the next questions for this Court are whether (1) the Texas action was timely filed where the statute of limitations was tolled until discovery of the fraud and breach of contract; and (2) whether the Savings Statute applies to toll the statute of limitations to one year after the Court

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[101] *Id.* at *7.
[102] *Id*. at *17.
[103] *Id*.
[104] 2019 WL 3074569, at *5 (Del. Ch. July 15, 2019).
[105] *Id.*; *see also AssuredPartners*, 2020 WL 2789706 at *13.

of Appeals first directed the Texas trial court to vacate its denial of Defendants' motion to dismiss.

iii. The doctrine of fraudulent concealment applies to the fraudulent inducement and breach of contract claims, but the accrual date would only be tolled to the time of discovery in September 2015.

There are several circumstances in which the running of the statute of limitations can be tolled.[106] These exceptions include: 1) fraudulent concealment; 2) inherently unknowable injury; and 3) equitable tolling.[107] If claims are untimely based on the statute of limitations, the plaintiff "bear[s] the burden of pleading specific facts demonstrating that the statute was tolled.[108] Wind Point alleges that there was fraudulent concealment of material facts prior to closing. There are sufficient facts to support a tolling argument based on the doctrine of fraudulent concealment.[109]

In summary, Wind Point alleges:

- The Management Presentation was false, misleading, and known to be such at the time it was issued. Defendants intended Wind Point to rely on the Management Presentation and Wind Point reasonably did so.[110]

- Because of the concealment of the MyCoat problems, Defendants presented the Interim Financial Statements for Wind Point's reasonable reliance which misrepresented the assets and income of Vision Ease. In particular and as set forth below, Defendants failed to record reserves for anticipated product returns associated with outstanding MyCoat Machine sales, impaired MyCoat Machines that remained in inventory, and failed to impair the MyCoat Machines prototypes in the Interim Financial Statements.[111]

- Wind Point could not have discovered with the exercise of reasonable diligence the problems associated with the MyCoat Machines and Defendants' failure to record reserves related thereto.[112]

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[106] *Smith v. Mattia*, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010).
[107] *Id.*
[108] *In re Coca–Cola Enters., Inc. S'holders Litig.*, 2007 WL 3122370, at *5 (Del. Ch. Oct. 17, 2007).
[109] *See* Compl. ¶¶ 137–140, 142, 197, 207, 212–213, 228–229.
[110] *Id.* ¶ 137.
[111] *Id.* ¶ 138.
[112] *Id.* ¶ 139.

- Moreover, Wind Point was prevented from conducting an analysis of the present and future cash flow impact associated with the failed MyCoat project which would result from having to service warranty claims going forward. Defendants hid the extent of these problems by providing only "cherry-picked" customers who were, at the time, reasonably satisfied with the MyCoat machines – satisfaction that would prove to be fleeting. Thus, Wind Point was exposed to future liability that was known to, and hidden by, Defendants at the time of the sale of Vision Ease.[113]

- Through the PPA process, Faber and other members of the legacy Vision Ease finance team concealed and perpetuated Defendants' fraud in connection with the manufacturing variance GAAP Error that had overstated EBITDA and overstated inventory within the Interim Financial Statements. Specifically, as part of the PPA, they wrote down the resulting overstated inventory through an adjustment to goodwill (a balance sheet account indicating that Wind Point, unbeknownst to them, paid a greater premium for the business because of this GAAP Error).[114]

- Through the PPA process, Faber and other members of the legacy Vision Ease finance team similarly concealed and perpetuated Defendants' fraud in connection with the O&E Reserve GAAP Error that had overstated EBITDA and overstated inventory within the Interim Financial Statements. As part of the PPA, they wrote down the resulting overstated inventory through an adjustment to goodwill.[115]

- By using the PPA adjustment in order to correct the O&E Reserve GAAP Error, Defendants not only confirmed that the material GAAP Error existed within the Interim Financial Statements at the time Wind Point purchased the company (despite Defendants' representation that there were no material errors), but also delayed Wind Point's earlier detection of that GAAP Error.[116]

- Wind Point could not have discovered with the exercise of reasonable diligence the GAAP Errors addressed herein, which resulted from Defendants' fraudulent accounting manipulations and were perpetuated by their subsequent PPA adjustments in the opening balance sheet. ""Faber and Defendants affirmatively acted to cover up the fraud following the close of the transaction on September 17, 2014.[117]

[113] *Id*. ¶ 140.
[114] *Id*. ¶ 207.
[115] *Id*. ¶ 212.
[116] *Id*. ¶ 213.
[117] *Id*. ¶ 197.

- Post-closing, Wind Point discovered that the MyCoat line of business was a complete failure. All machines that had been sold were ultimately returned, the A/R was not collectible, or the machines had to be fixed at such a substantial cost to Vision Ease that their cost was greater than the revenue. There was even litigation concerning one machine.[118]

- As a result of the conversations and documents that were provided in September 2015, new management and Wind Point began to undertake an investigation into the actions of Defendants prior to the sale in September 2014.[119]

- During the course of that investigation, McMenimen learned, inter alia, from a member of Vision Ease's legacy accounting staff about the facts surrounding the Defendants' failure to take the appropriate O&E reserve and the games that were played with respect to MyCoat.[120]

The Court, therefore, finds that Wind Point pleads facts sufficient to support tolling under the doctrine of fraudulent concealment. The statute of limitations would accrue at the time of discovery in or around September 2015. Under the Survival Clause, Wind Point was required to bring the breach of contract claims eighteen months later—March 2017. Wind Point was required to bring the claim for fraud, which has a three-year statutory period, by September 2018. Thus, the claim for breach of contract was not timely filed in Texas state court on September 11, 2017, but the claim for fraud was timely filed.

iv. The Savings Statute Applies to Wind Point's Fraud Claims, But Cannot Revive the Untimely Breach of Contract Claims.

Under Delaware law, fraud claims must be asserted within three years of the wrongful act.[121] The Savings Statute, 10 *Del. C.* §8118, applies to contract and fraud claims.[122] This Court has recognized that the Savings Statute applies where a plaintiff has brought an action in good faith in what proves to be the wrong forum to ensure that controversies "[are] decided [on]

[118] *Id.* ¶ 142.
[119] *Id.* ¶ 228.
[120] *Id.* ¶ 229.
[121] *See* 10 *Del. C.* § 8106(a).
[122] 10 *Del. C.* § 8106.

the merits …rather than upon procedural technicalities."[123] Under Delaware's Savings Statute, a plaintiff may commence a new action within one year of dismissal of a prior action that was avoided or defeated on matters of form.[124]

The Court finds that Wind Point's fraud claims are timely under the Savings Statute. Wind Point's Texas complaint was (1) timely filed in Texas based on its good faith belief that Texas state court was an appropriate forum, (2) dismissed by the Court of Appeals on procedural grounds, and (3) refiled in this Court within a year of dismissal.

SPA Section 9.16 provides:

> EACH OF THE PARTIES HERETO AGREES TO THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS LOCATED WITHIN THE STATE OF DELAWARE WITH RESPECT TO ANY CLAIM OR CAUSE OF ACTION ARISING UNDER OR RELATING TO THIS AGREEMENT, AND WAIVES PERSONAL SERVICE OF ANY AND ALL PROCESS UPON IT, AND CONSENTS THAT ALL SERVICES OF PROCESS BE MADE BY REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED, DIRECTED TO IT AS A NOTICE UNDER THIS AGREEMENT, AND SERVICE SO MADE SHALL BE DEEMED TO BE COMPLETED WHEN RECEIVED. EACH OF THE PARTIES HERETO WAIVES ANY OBJECTION BASED ON FORUM NON CONVENIENS AND WAIVES ANY OBJECTION TO VENUE OF ANY ACTION INSTITUTED HEREUNDER. NOTHING IN THIS PARAGRAPH SHALL AFFECT THE RIGHTS OF THE PARTIES HERETO TO SERVE LEGAL PROCESS IN ANY OTHER MANNER PERMITTED BY LAW.

First, Wind Point acted in good faith by filing its Petition in Texas because the decision was objectively reasonable.[125] Wind Point believed that it could not bring its claims in Delaware federal court because there was no federal subject matter jurisdiction.[126] Given that SPA Section 9.16 could not be performed as written, Wind Point alleges that Texas state court appeared to be

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[123] *Howmet Corp. v. City of Wilm*., 285 A.2d 423, 427 (Del. Super. 1971); *Marvel v. Prison Indus.*, 884 A.2d 1065, 1068 (Del. Super. 2005).
[124] 10 *Del. C.* § 8118.
[125] *McLeod v. McLeod*, 2015 WL 1477968, at *1 (Del. Super. Mar. 31, 2015).
[126] Compl. ¶¶ 17–21.

the most appropriate jurisdiction to resolve Wind Point's claims because the acts at issue in large part occurred in Texas and the principal places of business for the Defendants are in Texas.[127] The Texas courts' differing views on the proper forum for Wind Point's claims negates Defendants' argument that Wind Point chose strategically to file in an improper forum, and demonstrates that Wind Point had a good faith basis to file its Petition in Texas. Moreover, as the Texas trial court recognized, had Wind Point filed in Delaware state or federal court instead of Texas, Wind Point would have violated Rule 11 because it had no good faith belief that jurisdiction existed in those courts.[128]

Second, the Texas action was dismissed on "procedural technicalities."[129] In reversing the trial court, the Court of Appeals found that SPA Section 9.16 "is enforceable and [that] Wind Point did not establish [ ] an exception to enforcement."[130] Because Wind Point's complaint was dismissed on procedural forum grounds, Wind Point's Texas Petition was "avoided or defeated … for [a] matter of form" and falls within the Savings Statute.[131]

Finally, it is uncontested that Wind Point filed this action within the Savings Statute's one-year time period. Wind Point filed its claims here on August 27, 2019, less than a year after the Court of Appeals' August 28, 2018 decision and the October 2018 Texas trial court order implementing the Court of Appeals' decision.[132] For these reasons, Wind Point's fraud claims fall within the Savings Statute and are therefore timely.

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[127] *Id*. ¶¶ 7–12; *Troy Corp. v. Schoon*, 2007 WL 949441, at *4 (Del. Ch. Mar. 26, 2007).
[128] Ex. H to Burns Aff., at 46; Ans. Br. at 8–9.
[129] *See Howmet*, 285 A.2d at 427.
[130] *In re Rosewood Private Invs.*, Inc., 2018 WL 4403749, at *1, *6 (Tex. App.—Dallas Sept. 17, 2018).
[131] 10 *Del. C.* § 8118; *Howmet*, 285 A.2d at 427.
[132] *See* Compl. at 1; Opening Br. In Supp. of Defs.' Mot. to Dism. at 10, 25; Plf. Ans. Br. In Op. to Defs. Mot. to Dism. ("Ans. Br.") at 20; 10 *Del. C.* §8118(a).

v. The Doctrine of Equitable Tolling Applies.

In the realm of laches, a late-filed claim may be excused in "rare" instances when the claimant can demonstrate "unusual conditions" or "extraordinary circumstances."[133] While these terms have not been precisely defined, Delaware courts have consistently considered certain factors when determining whether to excuse late-filed claims as a matter of equity, including: (1) whether the plaintiff brought his claim, through litigation or any other means, before the statute of limitations expired; (2) whether the delay in filing suit can be explained by a material and unforeseeable change in the parties' personal or financial circumstances; (3) whether the delay in filing suit can be explained by a legal decision in another jurisdiction; (4) whether the defendant knew of, or participated in, any prior proceedings; and (5) whether, at the time the litigation began, a genuine dispute existed regarding the soundness of the claim.[134]

Based on the facts pled in the complaint, factors (1), (3), and (4) support equitable tolling of the TSA claim. Wind Point argues that it was prevented in an "extraordinary way" from asserting its TSA claim because it was unknowable whether Wind Point could file any of the claims it brings in the instant litigation until after (1) Insight, a Texas LLC (who participated in and controlled the fraud alleged here), consented to personal jurisdiction in Delaware state court in its Texas Mandamus Petition and (2) the Court of Appeals determined that SPA Section 9.16 was enforceable with respect to Delaware state court. Those two events did not occur until February 2018 and August 2018, respectively.[135] Furthermore, Wind Point timely asserted its rights in Texas because Wind Point filed its Texas Petition within the three year statutory period

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[133] *See Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 772 (Del. 2013); *IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 179 (Del. 2011).
[134] *O'Brien*, 26 A.3d at 178; *Levey*, 76 A.3d at 770.
[135] *See* Ans. Br. at 21–22.

beginning on September 2015, when Wind Point discovered the fraud.[136] Because Wind Point could not file any of its claims in this Court until at least after the Court of Appeals' decision in August 2018, Wind Point's TSA claim was equitably tolled until that time. As a result, under TSA's three-year statute of limitations, Wind Point's TSA claim was timely filed in this Court in August 2019. Moreover, Defendants knew of and participated in the Texas litigation.

Defendants argue the equitable tolling argument fails because Wind Point deliberately filed in the wrong forum. At this stage, this Court is required to draw inferences based on well-pleaded facts in favor of the non-moving party. Wind Point has repeatedly stated that it did not know if Delaware had jurisdiction under the language of the contract. The fact that the Court of Appeals reversed the lower court's decision further supports that the interpretation of the forum selection clause was unclear. Thus, equitable tolling applies under these unique circumstances.

b. THE SPA DOES NOT BAR WIND POINT'S FRAUD AND TSA CLAIMS.

i. Wind Point Has Standing to Assert Fraudulent Inducement.

Defendants contend that Wind Point lacks standing to bring its fraud claim because it did not sign the SPA, and thus can only get limited contractual rights as a "Purchaser Indemnitee" or an assignee. In Response, Wind Point alleges that even in the absence of the Assignment, Wind Point has standing to pursue its fraud claim because Defendants had a duty to Wind Point based on common law tort principles, independent of the SPA, to refrain from making intentionally false statements to Wind Point.[137] The elements of fraudulent inducement are: "1) a false statement or misrepresentation; 2) that the defendant knew was false or made with reckless

[136] *See* TSA § 33.H.(2).
[137] *See, e.g., Narrowstep, Inc. v. Onstream Media Corp*., 2010 WL 5422405, at *13 (Del. Ch. Dec. 22, 2010); *Data Mgmt. Internationale, Inc. v. Saraga*, 2007 WL 2142848, at *4 (Del. Super. July 25, 2007).

indifference to the truth; 3) the statement induced the plaintiff to enter the agreement; 4) the plaintiff's reliance was reasonable; and 5) the plaintiff was injured as a result."[138]

The term "standing" refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance.[139] Standing is a threshold question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a "case or controversy" that is appropriate for the exercise of the court's judicial powers.[140] The issue of standing is concerned "only with the question of who is entitled to mount a legal challenge and not with the merits of the subject matter in controversy."[141] The requirements for Article III constitutional standing are:

> (1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[142]

The Article III requirements for establishing standing to bring an action in federal court are generally the same as the standards for determining standing to bring an action in Delaware.[143]

The Complaint pleads circumstances sufficient to show standing for its fraudulent inducement claim. The breach of contract claim is based on Defendants' presentation of false

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[138] *In re Student Fin. Corp*., 2004 WL 609329, at *7 (D. Del. Mar. 23, 2004) (citing *Lord v. Sander*, 748 A.2d 393, 402 (Del. 2000)).
[139] *Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003).
[140] *Id.*
[141] *Id.*
[142] *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175–176 (3d Cir. 2000) ((citing *Lujan v. Defenders of Wildlife, 504 U.S.* 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).
[143] *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110–11 (2003) ("This Court has recognized that the Lujan requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware"); *see also Delaware Audubon v. Delaware Dep't of Nat. Res. & Envtl. Control*, 2018 WL 526594, at *4 (Del. Super. Jan. 19, 2018).

Interim Financial Statements pursuant to the SPA. Wind Point arguably has no right to rely on the Interim Financial Statements due to its status as a non-party of the SPA and the SPA's clause disclaiming reliance from third-party beneficiaries. In contrast, the fraudulent inducement claim is based on Defendants' verification of the QOE and concealment of information during due diligence. Specifically, Wind Point prepared the QOE and then asked Vision Ease to verify the QOE.[144] Wind Point alleges that Faber, acting on behalf of Defendants, falsely confirmed it was accurate and reliable.[145] Since Wind Point's fraud claim is based on conduct that is separate and distinct from the conduct that constitutes a breach of the SPA, it is not subject to the contractual limitations of remedies in the SPA. The Court finds that Wind Point has adequately alleged that the actions relating to the verification caused Wind Point to believe that it was paying the correct amount for the company and make the inflated payment. Accordingly, Wind Point has also adequately alleged that it suffered an injury in fact which was caused by the Defendants' fraudulent conduct. This alleged injury may be redressed by a decision in its favor.

Moreover, although Wind Point did not sign the agreement, Wind Point allegedly suffered financial loss in purchasing Vision Ease through its wholly owned entities, Vision Ease LP and Vision Ease GP. The Court notes that the cases relied upon by Defendants are distinguishable in that those cases did not involve the same type of close relationship between the non-party alleging fraudulent inducement and the party to the contract.[146] The relationship between the parties to the contract and the non-party asserting fraudulent inducement in *Madison*

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[144] Compl. ¶¶ 183–187.

[145] *Id*.

[146] *See Medimport S.R.L. v. Cabreja*, 929 F. Supp. 2d 1302, 1316 (S.D. Fla. 2013) (finding that plaintiff lacked standing to assert a fraudulent-inducement claim because it was not a party to the agreement and failed to allege any basis upon which it may otherwise invoke the benefits of a contract to which it is not a party); *Erwin v. Texas Health Choice, L.C.*, 187 F. Supp. 2d 661, 667– 68 (N.D. Tex. 2002) (dismissing fraudulent-inducement claim, because the "rights of third-party beneficiaries to sue a party to the contract extend only to" a breach of-contract claim); *Schneider v. David*, 564 N.Y.S.2d 727, 728 (1991) (holding that daughter of grantor lacked standing to bring suit seeking to set aside conveyance to grantee as fraudulently procured or on other grounds).

One Holdings, L.L.C. v. Punch Int'l, N.V., closely resembles Wind Point's relationship with Vision Ease LP and Vision Ease GP.[147] In *Madison One*, the District Court of Texas conducted a standing analysis:

> Houston businessman John P. Kotts ("Kotts") owns all of the entities that comprise Kotts Capital Holdings, L.P. (the "Kotts Partnership"). The Kotts Partnership owns all of the equity of Madison One Holdings, LLC ("Madison One"). Madison One is a holding company that owns all of the equity of Bou-Matic, LLC ("Bou-Matic"). Kotts is the chairman of the Kotts Partnership, Madison One, and Bou-Matic and directs their operations on a day-to-day basis.
>
> The Court acknowledges that BouMatic was the only Plaintiff to enter into the asset purchase transaction at issue in this case. However, Plaintiffs' state court petition, which alleges fraud, fraudulent inducement, and civil conspiracy, asserts that Kotts Partnership, Madison One, and BouMatic each suffered substantial financial losses as a result. Specifically, Plaintiffs state, "Bou-Matic paid approximately £5,000,000 for the Gascoigne Melotte business at the time it entered the APA [asset purchase agreement], with almost all of the funds provided by the Kotts Partnership." Based on the close relation between the Plaintiffs, the fact that Kotts was the individual negotiating the asset purchase transaction, and the allegations that Defendants fraud, fraudulent inducement, and civil conspiracy injured Plaintiffs, the Court finds that there exists a "real controversy between the parties, which ... will be actually determined by the judicial declaration sought." Accordingly, it finds that both Madison One and Kotts Partnership have standing in this matter.[148]

As in *Madison One*, the Complaint similarly alleges that Wind Point paid $180 million for Vision Ease and that it controlled the entities that signed the SPA, Vision Ease LP and Vision Ease GP.[149] Wind Point, through entities it controlled, purchased 100% of the outstanding Class A-1 Preferred limited partnership interests and 100% of the outstanding Class B Common limited partnership interests of Insight Equity A.P. X, LP (d/b/a Vision Ease Lens), a Texas limited partnership, from entities controlled by Defendants for a total of $180 million.[150] Wind

[147] *See Madison One Hldgs, L.L.C. v. Punch Int'l, N.V.*, 2008 WL 11483219, at *1 (S.D. Tex. Sept. 5, 2008).
[148] *Id*.
[149] SPA at 1.
[150] Compl. ¶ 244

Point, on or about August 1, 2017, sold Vision Ease but in connection with that sale received back an assignment of claims and rights sufficient to maintain standing.[151] Wind Point obtained an Assignment of Litigation from Vision Ease's parent company Performance Optics, LLC and its subsidiaries Vision Ease LP and Vision Ease GP when Vision Ease was sold in August 2017.[152] There is no dispute that Wind Point is a Purchaser Indemnitee under the SPA.[153] Wind Point also was actively engaged in the transaction negotiations. Wind Point is also contemplated in the agreement, specifically in the Notices to Purchaser and/or the Partnership section.

The facts as pled go directly to the inducement of Wind Point to pay Defendants an inflated price for Vision Ease and enter the agreement through its controlled entities, which appear to have been created solely for facilitating this transaction. Based on the close relation between Wind Point and the Purchaser, the fact that Wind Point was negotiating directly with Defendants, and the allegations that Defendants' fraudulent inducement injured Wind Point, the Court finds that there exists a real controversy between the parties, which will be actually determined by the judicial declaration sought.

ii. The Non-Reliance Provision does not Prevent Fraud Claims Based on the Alleged Omissions and Fraudulent Concealment.

Defendants next argue that the fraud claim must be dismissed because it is barred by the non-reliance provision of the SPA. According to Defendants, these provisions bar Wind Point from claiming it reasonably relied on any alleged misrepresentation or omission by Defendants outside those representations and warranties specified in the SPA. Wind Point's alleged fraudulent inducement claim concerns Defendants' verification of the QOE and Defendants' related fraudulent concealment. As explained above, the alleged fraudulent acts are outside the

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[151] *Id.* ¶ 6; *see generally* Assignment of Litigation.
[152] Compl. ¶¶ 6, 14 n. 2.
[153] SPA § 7.2.

SPA and thus the non-reliance provision does not apply to Wind Point's claim. Even if it did apply, the non-reliance provision would not bar Wind Point's claims.

Article IV of the SPA pertains to Defendants' representations and warranties.[154] SPA Section 9.1 pertains to Purchaser's disclaimer of representations and warranties:

> Purchaser acknowledges and agrees that, except for the representations and warranties expressly set forth in this Agreement (a) neither Seller makes, and has not made, any representations or warranties relating to itself or its businesses or otherwise in connection with the transactions contemplated in this Agreement and the Ancillary Documents, (b) no Affiliate, officer, employee or agent of either Seller has been authorized by either Seller to make any representation or warranty relating to a Seller, the Partnership or the Partnership's Subsidiaries or their respective businesses or otherwise in connection with the transactions contemplated in this Agreement and the Ancillary Documents and, if made, such representation or warranty must not be relied upon as having been authorized by a Seller, and (c) any estimates, projections, predictions, data, financial information, memoranda, presentations or any other materials or information provided or addressed to Purchaser or any of its representatives are not and shall not be deemed to be or to include representations or warranties unless any such materials or information is the subject of any representation or warranty set forth in this Agreement.[155]

Defendants claim that SPA Section 9.1 precludes all of the alleged misrepresentations and omissions cited in the Complaint because they all occurred prior to closing or outside the Agreement. Defendants argue that this express language bars any claim based on extra-contractual fraudulent misrepresentations.

In response, Wind Point contends that SPA Section 9.1 does not bar the fraud claim because SPA Section 9.1 is inapplicable to claims based on Defendants' fraudulent concealment of material facts prior to closing, including Defendants' failure to disclose that there were

[154] SPA art. IV.
[155] SPA § 9.1.

unadjusted for manufacturing variances when asked and failure to correct the information in the QOE.[156] Wind Point relies on *TransDigm Inc. v. Alcoa Global Fasteners, Inc.* for support.[157]

In *TransDigm*, the Court of Chancery declined to dismiss a counterclaim for "fraudulent concealment" despite an anti-reliance clause disclaiming reliance on "fraudulent misrepresentations."[158] Specifically, the anti-reliance clause provided:

> Buyer has undertaken such investigation and has been provided with and has evaluated such documents and information as it has deemed necessary to enable it to make an informed decision with respect to the execution, delivery and performance of this Agreement and the transactions contemplated hereby. Buyer agrees to accept the Shares without reliance upon any express or implied representations or warranties of any nature, whether in writing, orally or otherwise, made by or on behalf of or imputed to TransDigm or any of its Affiliates, except as expressly set forth in this Agreement.[159]

This provision purports to disclaim reliance on representations and warranties outside of the stock purchase agreement. The defendant argued this provision had also disclaimed reliance on the "accuracy and completeness" of the information and extra-contractual omissions.[160] However, the Court of Chancery contrasted this provision with other cases where acquirers had expressly agreed that the selling company was not making any representation or warranty as to the accuracy or completeness of the information being provided to the acquirer.[161] Because there was no such agreement by the acquirer in *TransDigm*, the Court of Chancery concluded that the buyer's disclaimer of reliance on any representations and warranties outside of the stock purchase agreement did not bar the buyer's claim for fraudulent *concealment* of material information.[162] Under the language, the Court of Chancery found that the counterclaim plaintiff

[156] Ans. Br. at 23 (citing Compl. ¶¶ 94, 183–184, 227, 239).
[157] 2013 WL 2326881 (Del. Ch. May 29, 2013).
[158] *Id*. at *8.
[159] *Id*. at *9.
[160] *Id*. at *8.
[161] *Id*. at *9.
[162] *Id*.

"reasonably could have relied on the assumption that [counterclaim defendant] was not actively concealing information that was responsive to [counterclaim plaintiff's] inquiries and that [the counterclaim defendant] was not engaged in a scheme to hide information material to [the counterclaim plaintiff's] purchase of [the company]."[163] Accordingly, the Court of Chancery denied the motion to dismiss as to the fraudulent concealment claim.

The U.S. District Court for the District of Delaware has cautioned that the *TransDigm* "exception" as to fraudulent concealment claims is limited:

> [the plaintiff] cannot circumvent Abry's holding by arguing the Defendants neglected to inform [the plaintiff] that its representations were false. Every misrepresentation, to some extent, involves an omission of the truth, and [the plaintiff] cannot re-characterize every misrepresentation as an omission. Therefore, simply characterizing something as an "omission" does not render the anti-reliance provision a nullity. The Court's discussion in *TransDigm* concentrated on "concealment." [164]

Thus, an affirmative act of concealment is sufficient to differentiate an "omission" claim from a misrepresentation claim. However, an affirmative act of concealment must be adequately plead in the complaint. In *ITW Global Investments Inc. v. American Industrial Partners Capital Fund IV, L.P.*, this Court rejected plaintiff's argument that its claims were not barred by the anti-reliance clause in the securities purchase and sale agreement.[165]

The anti-reliance clause stated, in relevant part:

> [ITW] is not relying (for purposes of entering into this Agreement or otherwise) upon any advice, counsel or representations (whether written or oral) of the Sellers' Representative, Parent, any Subsidiary of Parent or any Seller other than those representations expressly made hereunder....

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[163] *Id.*
[164] *Universal Am. Corp. v. Partners Healthcare Solutions Hldgs, L.P.*, 61 F.Supp.3d. 391, 400 (D. Del. 2014).
[165] 2015 WL 3970908, at *9 (Del. Super. June 24, 2015).

Like *TransDigm*, this anti-reliance provision did not disclaim fraud based on concealment of information. Unlike *TransDigm*, this Court found that the complaint focused on the defendant allegedly misrepresenting—not concealing—the financial condition of Brooks with respect to the November 2011 sales.[166] Because the complaint only alleged fraudulent inducement based on the representations in the agreement, the Court granted the motion to dismiss on the fraudulent inducement claim. Unlike the plaintiff in *ITW*, Wind Point has adequately pleaded fraudulent concealment in the Complaint. Because of the alleged affirmative actions to conceal in addition to the omitted representation, the alleged conduct constitutes an omission that is not barred by the anti-reliance language.

iii. Wind Point Has Standing as a Purchaser of a Security under the TSA.

Wind Point has standing to assert claims against Defendants as a purchaser of a security under the TSA. The TSA "creates a cause of action that may be brought by a 'person buying [a] security' against the seller of the security, if the sale was made by means of a material omission or misrepresentation."[167] Under the TSA, the purchaser "can be a separate entity from the one that technically holds the purchased security" when "hold[ing] otherwise would frustrate the remedial purposes of the securities laws, when the technical purchaser of the securities is a shell corporation, and when the seller directly solicited the putative, de-facto buyer."[168] The TSA also prohibits non-reliance clauses from limiting a party's right to assert claims under the TSA.[169] Under the circumstances of this case, Wind Point has the right to assert a claim for violation of the TSA as the "'the actual party at risk' in the transaction."[170]

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166 *Id.*
167 *In re Tremont Sec. Law, State Law, & Ins. Litig*., 2013 WL 2257053, at *5 (S.D.N.Y. May 23, 2013) (quoting Vernon's Ann. Tex. Civ. St. Art. 581-33A(2)).
168 *Id*. at *28.
169 TSA §33L; *Aegis Ins. Hldg. Co. v. Gaiser*, 2007 WL 906328, at *5 (Tex. App. —San Antonio Mar. 28, 2007, pet. Denied) (mem. op.).
170 *Aegis Ins.*, 2007 WL 906328, at *28 (citations omitted); Compl. ¶ 6.

iv. Wind Point's Fraud and TSA Claims Against Insight Equity Management and Rosewood Private Investments are not Barred by the Exclusive-Remedies Clause.

Defendants next argue that the SPA's exclusive-remedies clause bars Wind Point's fraud and TSA claims against Insight Equity Management and Rosewood Private Investments for representations made by the Sellers or the Company. Defendants rely on SPA Section 7.10, arguing that indemnification was the "sole and exclusive remedy … with respect to matters arising under or relating to the SPA" subject to three limited exceptions.[171] One exception allows fraud claims against a SPA "Party."[172] Thus, Defendants argue that each party waived its right to bring a fraud, tort, or statutory claim against a non-party to the SPA.

However, as explained above, SPA Section 9.1 does not apply to exclude the alleged omissions and fraudulent concealment. Furthermore, SPA Section 9.1 states only that Wind Point agrees that

> no Affiliate, officer, employee or agent of either Seller has been authorized by either Seller to make any *representation or warranty* relating to a Seller, the Partnership or the Partnership's Subsidiaries or their respective businesses or otherwise in connection with the transactions contemplated in this Agreement and the Ancillary Documents and, if made, such representation or warranty must not be relied upon as having been authorized by a Seller.[173]

Thus, the alleged omissions and acts of fraudulent concealment are enough to survive at this early stage of the litigation. There is no disclaimer that such actions are not authorized by the Sellers. Accordingly, the plain language of the SPA does not bar the fraud claims against Insight Equity Management and Rosewood Private Investments.

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[171] SPA § 7.10.
[172] *Id*. § 7.10.
[173] *Id*. § 9.1 (emphasis added).

v. The SPA's Delaware Choice-of-Law Clause does not Bar the TSA Claim.

SPA Section 9.11 provides that Delaware law governs the "validity, enforcement, interpretation, construction, effect and all other respects" of the agreement.[174] Defendants claim that the Delaware choice-of-law clause is broad, while Wind Point argues that it is narrow. Regardless of the breadth of SPA Section 9.11, the TSA claims are not barred.

Delaware courts are "strongly inclined" to respect the widely recognized and fundamental principle of freedom to contract.[175] The Court will not interfere unless "upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract."[176] "[W]ith very limited exceptions, [Delaware] courts will enforce the contractual scheme that the parties have arrived at through their own self-ordering, both in recognition of a right to self-order and to promote certainty of obligations and benefits. Upholding freedom of contract is a fundamental policy of this State."[177] "Delaware [c]ourts will honor a contractually-designed choice of law provision so long as the jurisdiction selected bears some material relationship to the transaction."[178] The existence of a choice-of-law clause establishes a material relationship between the chosen state and the transaction.[179]

Section 2708 of Title 6 of the Delaware Code provides, in relevant part:

> The parties to any contract, agreement or other undertaking ... may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws ... if the

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[174] *Id*. § 9.11.
[175] *Libeau v. Fox,* 880 A.2d 1049, 1056–57 (Del.Ch.2005), *aff'd in pertinent part*, 892 A.2d 1068, 2006 WL 196379 (Del. Jan. 24, 2006).
[176] *Id*. at 1056; *see also Maddock v. Greenville Retirement Community, L.P*., 1997 WL 89094, at *7–8 (Del.Ch. Feb.26, 1997) ("Only a very strong showing that a contract term is a gross violation of the policies embodied in this common law rule [that reasonable restraints be upheld] would permit [plaintiff] to escape the economic bargain that he entered.") (citations omitted).
[177] *Ascension Ins. Hldgs, LLC v. Underwood*, 2015 WL 356002, at *4 (Del. Ch. Jan. 28, 2015).
[178] *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 766 (Del. Ch. 2014) (quoting *J.S. Alberici Const. Co. v. Mid–W. Conveyor Co*., 750 A.2d 518, 520 (Del. 2000)).
[179] *Change Capital Partners Fund I, LLC v. Volt Elec. Sys., LLC*, 2018 WL 1635006, at *5 (Del. Super. Apr. 3, 2018).

> parties, either as provided by law or in the manner specified in such writing are, (i) subject to the jurisdiction of the court of, or arbitration in, Delaware and (ii) may be served with legal process. The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this state.[180]

Yet, Delaware courts have recognized the exception in the Restatement (Second) of Conflicts § 187(2)(b) stating, "the Restatement is generally supportive of choice-of-law provisions, but recognizes that allowing parties to circumvent state policy-based contractual prohibitions through the promiscuous use of such provisions would eliminate the right of the default state to have control over enforceability of contracts concerning its citizens."[181] "A mere difference between the laws of two states will not necessarily render the enforcement of a cause of action arising in one state contrary to the public policy of another."[182]

In *Ascension Ins. Holdings, LLC v. Underwood*, the Court of Chancery held:

> where the parties enter a contract which, absent a choice-of-law provision, would be governed by the law of a particular state (which I will call the "default state"), and the default state has a public policy under which a contractual provision would be limited or void, the Restatement recognizes that allowing the parties to contract around that public policy would be an unwholesome exercise of freedom of contract.[183]

In order for SPA Section 9.11 not to apply to the TSA claims, Wind Point must demonstrate that absent the choice-of-law provision, Texas would be the "default state" whose law would apply, enforcement of the SPA would be contrary to a fundamental public policy of Texas, and Texas has a materially greater interest than Delaware in enforcement or non-

[180] 6 *Del. C.* § 2708.
[181] *Ascension*, 2015 WL 356002, at *2.
[182] *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 45 (Del. Ch. 2012) (quoting *J.S. Alberici Const. Co.*, 750 A.2d at 520).
[183] 2015 WL 356002, at *2.

enforcement of the SPA. Wind Point must make a showing of all of the above in order to invoke the Restatement (Second) of Conflicts § 187(2)(b) exception.[184]

It is the fundamental policy of Texas to protect investors.[185] The TSA "is a broad remedial statute intended not only to protect Texas residents but also non-Texas residents from fraudulent securities practices emanating from Texas."[186] Furthermore, the TSA is also protective of investors, and arguably just as protective as the Delaware Securities Act. Texas' Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-33 L, prohibits and voids choice-of-law provisions that purport to waive the applicability of the TSA:

> L. Waivers Void. A condition, stipulation, or provision binding a buyer or seller of a security or a purchaser of services rendered by an investment adviser or investment adviser representative to waive compliance with a provision of this Act or a rule or order or requirement hereunder is void.[187]

This provision appears to have been enacted to prevent sellers of securities from using contractual waivers or choice-of-law provisions to narrow the protection from fraud at which the Texas Securities Act is aimed.[188] These anti-waiver provisions also void waivers of rights by subsequent conduct.[189]

Defendants' interpretation that SPA Section 9.11 acts as a waiver of rights under the TSA would lead to absurd results and leave investors without protection. The primary purpose of the Delaware Securities Act is "to provide a basis for stopping intrastate securities fraud."[190] The

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[184] *Ascension*, 2015 WL 356002, at *3 (finding that "[i]f both these questions are answered in the affirmative, California law will apply notwithstanding the choice-of-law provision in the [contract].").
[185] *See In re Enron Corp. Secs.*, 235 F.Supp.2d 549 691–92 (S.D. Tex. 2002).
[186] *Id*.
[187] Tex. Rev. Civ. Stat. Ann. art. 581-33 L (Vernon Supp.1991).
[188] *See* 15 U.S.C. § 77n; Tex.Civ.Stat.Ann. art. 581–33 L (Vernon Supp. 1991).
[189] *Haralson v. E.F. Hutton Grp., Inc*., 919 F.2d 1014, 1034 (5th Cir. 1990)
[190] 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 17.7[A], at 17–43 (3d ed. Supp. 2014). *See also* 6 *Del. C.* § 73–101(b) ("The purpose of the Delaware Securities Act is to prevent the public from being victimized by unscrupulous or overreaching broker-dealers, investment advisers and other agents in the context of selling securities or giving investment advice, as well as to remedy any harm caused by securities law violations.")

Delaware Securities Act is not meant to regulate interstate securities transactions. Defendants rely on *Abry Partners V, L.P. v. F & W Acquisition LLC* as support for the contention that law governing contact should bar the securities claim.[191] However, the Court of Chancery in *Abry* only ruled on the law governing fraud and negligent misrepresentation claims.[192] The Court of Chancery in *FdG Logistics LLC v. A&R Logistics Holdings, Inc*. has expressly rejected extending the ruling in *Abry* to securities claims:

> Consistent with the Court's analysis in *Abry* and other cases applying the statute, I view Section 2708 as intending to permit contracting parties to incorporate the law of Delaware, which primarily would concern its common law, to decide questions concerning the interpretation and enforceability of a contract. What Section 2708 does not stand for, in my view, is a mechanism for the wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties. Significantly, A & R cites no authority construing Section 2708 in this manner, which would risk absurd results contrary to basic principles of statutory construction. Would, for example, a Delaware choice of law provision stating that a merger agreement is to "be governed by" Delaware law trigger application of the Delaware tax code to a merger where it otherwise would not apply? Could entities incorporated outside of Delaware find themselves bound by the Delaware General Corporation Law's requirements for stockholder approval of a merger by including such a provision in their merger agreement, contrary to the internal affairs doctrine? It is difficult to imagine that this was the intention of Section 2708 or that parties to a merger agreement ever would have intended these outcomes by virtue of including a choice law provision similar to Section 10.9 of the Merger Agreement here.
>
> More to the point, construing Section 10.9 as A & R advocates would lead to the bizarre result of allowing contractual parties to convert a blue-sky law that was intended to regulate *intrastate* commerce into one that would apply to *interstate* commerce. Accordingly, I conclude that it would be unreasonable to construe Section 10.9 of the Merger Agreement to encompass the Delaware Securities Act and make it apply automatically in this case. Instead, the applicability of the Act must depend on whether a sufficient nexus exists between Delaware and the merger transaction at issue.[193]

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[191] 891 A.2d 1032 (Del. Ch. 2006).
[192] *Id*. at 1039.
[193] *FdG Logistics LLC v. A&R Logistics Hldgs, Inc*., 131 A.3d 842, 855-856 (Del. Ch.), *aff'd sub nom. A & R Logistics Hldgs, Inc. v. FdG Logistics LLC*, 148 A.3d 1171 (Del. 2016).

Thus, Defendants' interpretation is not reasonable. Wind Point has pleaded facts sufficient to show Texas is the default state, it has a materially greater interest than Delaware, and enforcement of the SPA would be contrary to Texas' public policies. The TSA claim is not barred by the SPA and survives under 12(b)(6)'s minimal pleading standard.

VI. CONCLUSION

For the reasons set forth above, the Court **DENIES** the Motion as to Count III and **GRANTS** the Motion as to Counts I and II.

Dated: August 17, 2020
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

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